

**United States Department of Labor
Employees' Compensation Appeals Board**

D.L., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
COMMISSARY AGENCY, Camp Pendleton, CA,
Employer**

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**Docket No. 10-2291
Issued: July 13, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 7, 2010 appellant filed a timely appeal of an August 25, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) which reduced her compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation effective August 29, 2010 based on its determination that the constructed position of social service aide represented her wage-earning capacity.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 14, 1998 appellant, then a 38-year-old commissary store worker, submitted a traumatic injury claim alleging that on October 17, 1997 she experienced back and lower leg pain when a pallet fell and pushed her into a machine. OWCP accepted her claim for cervical strain, lumbar contusion and a temporary aggravation of cervical degenerative disc disease. On May 27, 1999 OWCP placed her on the periodic rolls for temporary total disability.

In a July 27, 1999 medical report, Dr. Mark S. Stern, a Board-certified neurological surgeon, stated that appellant was capable of working eight hours a day but limited her to no more than one hour of continuous walking or standing, no overhead repetitive reaching with arms, limited reaching over shoulders or twisting, and pushing, pulling, and lifting up to 15 pounds. The employer was unable to accommodate appellant's work restrictions.

In a letter dated December 14, 1999, OWCP referred appellant for development of a vocational rehabilitation program based on Dr. Stern's July 27, 1999 medical report. On January 3, 2000 the vocational rehabilitation counselor met with appellant for plan development and suggested additional education to receive more training. Appellant completed a General Educational Development (GED) preparation course and enrolled in classes to receive an Associates Degree as a personal computer information specialist. On February 5, 2002 the vocational rehabilitation counselor selected the positions of office helper and administrative assistant for appellant. Both jobs were considered light and sedentary.

In a July 26, 2002 work restriction form, Dr. Adekola Ashaye, a Board-certified internist, examined appellant and diagnosed degenerative cervical strain, aggravated by degenerative disc disease of the cervical spine and lumbar contusion. He limited appellant's work to three to four hours of sitting, one to two hours of walking, one to two hours of pushing, pulling, and lifting up to 15 pounds, and no standing, reaching above the shoulder, twisting, squatting, kneeling, climbing, squatting or kneeling. The vocational rehabilitation counselor advised appellant that the new work restrictions of only working three to four hours prevented her from reaching her goal of returning to the labor market. Appellant's case was placed in interrupted status until the issue of her work restrictions resolved. Appellant continued to further her education and receive training.

In a May 17, 2005 work evaluation form, Dr. Ashaye, modified appellant's work restrictions and stated that she was capable of working eight hours with an appropriate chair, one to two hours of walking, standing, reaching, twisting, bending, and stooping, and one to two hours of pushing, pulling and lifting up to 10 pounds. Dr. Ashaye noted appellant's October 16, 1997 injury and stated that she had been a patient since May 2002 for continued neck, shoulder, and back pain, diabetes and hypothyroidism.

In a letter dated December 15, 2005, OWCP advised the employing establishment that appellant was able to return to work with restrictions and requested whether work was available within her restrictions. On May 22, 2006 the employing establishment notified OWCP that it did not have any positions available which fit those restrictions.

In a July 30, 2007 work capacity evaluation, Dr. Ashaye modified appellant's work restrictions to eight hours of sitting in a supportive chair, three to four hours of walking, one to two hours of standing, reaching, reaching above the shoulder, twisting, bending, and stooping, and one to two hours of repetitive wrist and elbow movements, pushing, pulling and lifting up to 10 pounds. Appellant was restricted from any squatting, kneeling and climbing. Dr. Ashaye advised that appellant needed proper back and neck support and an ergonomic workstation. On an August 2, 2007 medical report his physician's assistant and Dr. Ashaye provided an accurate history of the October 16, 1997 injury and noted her complaints of continued neck, back, and shoulder pain, particularly of radiating pain down her right arm and numbness on the lateral aspect of her right thigh. Dr. Ashaye observed sequela of appellant's medical conditions of degenerative disc disease in both her cervical and lumbar spine. A recent x-ray revealed marked degeneration of her lumbar discs that was possibly exacerbated by her work injury. Dr. Ashaye concluded that of her diagnosed conditions, degeneration of the cervical spine was the only one present and that appellant was capable of performing a sedentary job without a great deal of manual lifting.

On April 17, 2008 OWCP referred appellant for vocational rehabilitation services for the period April 23 to July 23, 2008. On May 1, 2008 the vocational rehabilitation counselor met with appellant and noted that her medical history revealed treatments for carpal tunnel syndrome, osteoarthritis in her feet, hypothyroidism, Type II diabetes, rheumatoid arthritis, and high cholesterol. The vocational rehabilitation counselor also reviewed her education and noted that she obtained her Basic PC Skills certificate in August 2003 and her Associate of Applied Science degree in Human Services in May 2006. Appellant reported an interest in working in the schools or a medical based facility with a focus on human services, but felt that some barriers to her employment included her medical conditions, lack of recent paid work experience, no driver's license, limited finances and targeting a wage of \$12.00 to \$15.00/hour.

On July 14, 2008 appellant's case was put on hold for vocational services until more specific medical information regarding appellant's work-related restrictions was obtained.

In a July 30, 2008 magnetic resonance imaging (MRI) scan report, Dr. Martin Butler, a Board-certified diagnostic radiologist, observed normal vertebral marrow signal with no subluxation and abnormal paraspinal mass. He diagnosed anterior bridging osteophytes compatible with diffuse idiopathic skeletal hyperostosis and multilevel degenerative disc disease with multilevel protrusions and bulge and multilevel central protrusions.

In a September 29, 2008 report, Dr. Ashaye noted that appellant was injured on October 16, 1997 when a palate hit her from behind at work. Appellant continued to complain of neck and shoulder pain with loss of functionality. Dr. Ashaye stated that her conditions were permanent and that the injury aggravated her idiopathic skeletal hyperostosis and degenerative disc disease of her cervical spine, as confirmed by the July 30, 2008 MRI scan report. He reported that appellant was not expected to return to her preinjury status and had since developed right shoulder bursitis and carpal tunnel syndrome in her right wrist. Dr. Ashaye provided a work capacity evaluation form indicating that appellant was unable to work for eight hours a day with restrictions due to weakness in her arms, loss of stamina and increasing neck pain with activity. He further stated that appellant's restrictions were permanent and that it was unlikely that appellant would be able to work an eight-hour workday. Dr. Ashaye restricted appellant to

eight hours of sitting with a supportive chair, three to four hours of walking and repetitive movement of her wrists and elbows, one to two hours of standing, reaching, reaching above shoulder, twisting, bending or stooping, one to two hours of pushing, pulling, and lifting up to 10 pounds, and no squatting, kneeling or climbing.

In a December 12, 2008 rehabilitation report, the vocational counselor reviewed Dr. Ashaye's September 29, 2008 medical report and work restrictions. She noted that appellant was released to work from three to four hours a day in a sedentary capacity permanently. The counselor remained guarded about appellant's probability of success due to her lack of recent paid work experience, a driver's license and concern over using public transportation.

Appellant continued her job search activities and her cooperation with vocational rehabilitation services. She reported that she was looking for work but was unable to find a job. The vocational rehabilitation counselor referred her for computer training to refresh her typing and computer skills.

The vocational rehabilitation counselor selected two positions for appellant as a social services aide and an administrative clerk. Both jobs were considered light involving up to 20 pounds of force occasionally, 10 pounds of force frequently, and a negligible amount of force constantly. Regarding the social services aid position, the rehabilitation counselor conducted a labor market survey and contacted twelve employers in appellant's geographic area. Of the twelve employers contacted, only three hired applicants with an associate degree, but no bachelor degree. Of these three employers, one required that the applicant hold a valid drivers license with auto liability insurance. Neither of the two remaining employers verified that the position was available on a part-time basis. The rehabilitation counselor found that there were part-time and full-time employment opportunities in the designated geographic area for the selected positions outlined. She stated in a May 12, 2009 report that these constructed positions were being performed in sufficient numbers so as to make the jobs reasonably available for appellant within her commuting areas.

On July 1, 2009 appellant's 90 days of job search concluded that OWCP authorized an additional 30 days. She continued to cooperate with vocational rehabilitation services and participate in job search activities.

In an October 5, 2009 report, the vocational rehabilitation counselor found that appellant was unable to find employment due to the current state of the economy and high unemployment rate. She also noted that appellant had various obstacles to employment, including her physical condition, lack of a driver's license, concern over using public transportation, and work hour shift issues that were unrelated to her accepted conditions. The counselor opined that it was unlikely that additional time would provide a placement opportunity for appellant. She advised that the case be closed and a loss of wage-earning capacity be determined.

In a letter dated March 24, 2010, OWCP proposed to reduce appellant's wage-loss benefits. It determined that the medical evidence established that she was no longer totally disabled and had the capacity to earn wages as a part-time social service aide at the rate of \$265.49 a week. In an attached worksheet, OWCP found that appellant's pay rate when she sustained her injury was \$251.08; the current adjusted pay rate for her job on the date of injury

was \$446.30 a week. OWCP determined that she had a 59 percent wage-earning capacity of \$148.14 a week and a loss of wage-earning capacity of \$102.94. At the three-fourths augmented compensation rate, appellant would receive wage-loss benefits of \$77.21 a week, increased by cost-of-living adjustments to \$104.25 per week, for a net compensation of \$417.00 every four weeks.

By decision dated August 25, 2010, OWCP reduced appellant's compensation benefits effective August 29, 2010, finding that the position of part-time social service aide was medically and vocationally suitable.

LEGAL PRECEDENT

Section 8115(a) of FECA provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings, if her actual earnings fairly and reasonably represent her wage-earning capacity.² If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.³ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁴ In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.⁵

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁶ When it makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) or otherwise available in the open labor market, that fits that employee's capabilities with regards to her physical limitation, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁷

² *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

³ 5 U.S.C. § 8115(a); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

⁴ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁵ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

⁶ *Beatty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984); *H.N.*, Docket No. 09-1628 (issued August 19, 2010).

⁷ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999); *Hattie Drummond*, 39 ECAB 904 (1988); see *Alfred C. Shadrick*, 5 ECAB 376 (1953).

ANALYSIS

OWCP determined that appellant had the capacity to earn wages as a part-time social services aide at the rate of \$265.49 per week part time. It found that the position was within her work limitations. The Board finds, however, that OWCP did not properly determine that the part time position was within appellant's educational and licensing qualifications or reasonably available within appellant's commuting area.

In a September 29, 2008 work capacity evaluation, Dr. Ashaye noted that appellant was unable to work eight-hour days, but that appellant could return to work with restrictions.

A vocational rehabilitation counselor selected the position of part-time social services aide for appellant and determined that the position was being performed in sufficient numbers so as to make the job reasonably available within appellant's commuting area.

It is well established that OWCP must consider various factors when determining the suitability of a constructed position, including qualifications for employment such as education, previous employment and work limitations. The Board finds that OWCP did not properly consider these factors when modifying appellant's compensation based on her wage-earning capacity in the constructed position of social services aide. According to the labor market survey, all but three of the job positions required a bachelor's degree; one of the three positions also required a valid driver's license with insurance. Appellant, however, only has an associate's degree and does not have a driver's license.

OWCP also did not meet its burden of proof to establish that the position was reasonably available on a part-time basis. The Board has found that, if OWCP determines that appellant is capable of performing only part-time work, then it must find a position within appellant's work limitation that is reasonably available on a part-time basis.⁸ A general finding that the position is reasonably available is not sufficient because a position available on a full-time basis may not be available on a part-time basis.⁹ In this case, of the 12 employers contacted in the labor market survey, pertaining to the social services aide position, after ruling out 10 of the positions because appellant did not qualify based upon education or licensing, none of the remaining two employers indicated that the position was available on a part-time basis. Thus, the Board finds that OWCP did not properly determine that the position of social services aide was reasonably available within appellant's commuting area on a part-time basis.

Thus, the Board finds that OWCP improperly determined that the constructed position of part-time social service aide represented her wage-earning capacity. Accordingly, the case should be reversed.

⁸ *Lewis B. Jackson*, 32 ECAB 1225 (1981); *Wordie G. Turner*, 19 ECAB 530 (1968).

⁹ *Id.*; see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c)(3) (April 2011).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation effective August 29, 2010 based on its determination that the constructed position of social services aid represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 13, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board